

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Falcon Community Cable, L.P. d/b/a Charter Communications)	CSR-5964-E
)	
Petition for Determination of Effective Competition in Seven Kentucky Communities)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 2002

Released: November 4, 2002

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Falcon Community Cable, L.P. d/b/a Charter Communications ("Charter") has filed with the Commission a petition pursuant to Section 76.7 of the Commission's rules for a determination of effective competition in seven communities in Kentucky (the "Communities").¹ Charter alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(a) of the Communications Act of 1934, as amended ("Communications Act"), and Section 76.905(b)(1)-(2) of the Commission's rules, and seeks revocation of the certifications of the local franchising authorities in the Communities to regulate basic cable service rates.² Charter claims the presence of effective competition in six of the Communities stems from the competing services provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. and EchoStar Communications Corporation ("EchoStar"). Within unincorporated Knox County, Charter contends that effective competition exists under the low penetration test. Oppositions to the petition were filed by the City of Burnside and Pulaski County.³

¹ 47 C.F.R. § 76.7. The Communities are: the Cities of Burnside, Columbia, Corbin, and Monticello; and the Counties of Knox, McCreary and Pulaski.

² 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(2). The local franchising authorities in each of the Communities are certified to regulate basic cable service rates except for Knox County. Charter's petition with respect to Knox County shall be treated as a petition for a finding of effective competition.

³ The City of Burnside and Pulaski County argue in their Oppositions that Charter has failed "to resolve the problem alleged in its Petition, contrary to the provisions of Section 76.7 of the Commission's Rules." Burnside Opposition at 1; Pulaski Opposition at 1. While Section 76.7(a)(4)(ii) of the Commission's Rules once required petitioners to attempt the resolution of disputed issues prior to initiating a petition or complaint, this requirement was eliminated in 1999. See 1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint (continued...)

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. Based on the record in this proceeding, Charter has met this burden.

A. The Competing Provider Test

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds fifteen percent (15%) of the households in the franchise area.⁶

4. Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁷ Charter has provided evidence of the advertising of DBS service in news media serving the Communities.⁸ The City of Burnside and Pulaski County dispute the sufficiency of the advertising provided by Charter in order to demonstrate that households within the Communities are reasonable aware of the availability of DBS service.⁹ Neither local franchising authority, however, provides any rationale explaining or supporting this assertion.¹⁰ We have previously found that the types of media provided by Charter, such as local newspaper advertisements and direct mail marketing, demonstrate that potential subscribers are reasonably aware of the availability of a competitor's service.¹¹ We conclude that Charter has met its burden in this regard.

5. The City of Burnside and Pulaski County further contend that the DBS providers' programming is not comparable to that offered by Charter.¹² Charter has submitted the DBS providers'

(...continued from previous page)

Rules, 14 FCC Rcd 418 (1999). *See also* Reply at 2.

⁴ 47 C.F.R. § 76.906.

⁵ 47 C.F.R. § 76.905.

⁶ 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁷ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁸ Petition at 4 and Exhibit 1.

⁹ Burnside Opposition at 1; Pulaski Opposition at 1.

¹⁰ *Id.*

¹¹ *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5631, 5657 (1993) ("potential subscribers may be made reasonable aware of the availability of a competing service, for example, through advertising in regional or local media, direct mail, or any other marketing outlet").

¹² Burnside Opposition at 1; Pulaski Opposition at 1.

nationwide channel lineups as well as its own channel lineups for the systems serving the Communities.¹³ These channel lineups demonstrate that the DBS providers carry more than 100 channels of video programming, including CNN, ESPN and HBO, while Charter's systems each carry at least 38 channels of similar programming.¹⁴ We find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.¹⁵

6. Charter has demonstrated that the Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise areas. Charter has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of the DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and EchoStar.¹⁶ Therefore, the first prong of the competing provider test is satisfied.

7. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Charter sought to determine the competing provider penetration in six of its franchise areas by purchasing a report from SkyTrends that identified the number of subscribers attributable to the DBS providers within the Communities on a five-digit zip code basis.¹⁷ However, rather than simply accepting SkyTrends' figures, Charter assumes that some of the DBS subscribers identified in the report may actually live in zip codes outside of the Communities.¹⁸ To account for such a possibility, Charter has devised a formula that compares U.S. Census household data for the Communities and the relevant zip codes in order to derive an allocation to apply against the DBS subscriber count.¹⁹ Charter also reduces the estimated DBS subscriber count by 15 percent to reflect the possibility that some households have subscribed to both cable and DBS service and to take into account commercial or test accounts.²⁰ The City of Burnside and Pulaski County challenge Charter's calculation of the number of households served by competing providers.²¹ Neither local franchising authority explains or supports its position.²²

¹³ See Petition at 4-5 and Exhibits 2, 3. Exhibit 2 contains the nationwide channel lineups of DirecTV and EchoStar and Exhibit 3 includes the channel line-ups for Charter's cable systems serving the Communities.

¹⁴ *Id.*

¹⁵ See 47 C.F.R. § 76.905(g). See, e.g., *Mountain Cable Company*, 14 FCC Rcd 13994, 14001 (1999) (finding that the programming of both DBS providers satisfies the programming compatibility component of the competing provider effective competition test).

¹⁶ Petition at 3-4.

¹⁷ Petition at 5.

¹⁸ *Id.* at 5-6.

¹⁹ *Id.* at 5-6 and Exhibits 4-6.

²⁰ *Id.* at 6. According to documentation previously provided to the Commission, SkyTRENDS' zip code subscriber numbers are inflated by roughly ten percent "due to dual receivers, and limited commercial and test accounts." See *Charter Communications*, DA 02-1919 at n.13 (MB rel. Aug. 6, 2002). Since then, SkyTRENDS has reportedly revised its inflation estimate from ten to fifteen percent. Petition at n.17.

²¹ Burnside Opposition at 2; Pulaski Opposition at 1-2.

²² *Id.*

Moreover, Burnside and Pulaski seek an unspecified amount of “additional time in which to provide evidence on [their] behalf.”²³ The Commission does not routinely grant extensions of time.²⁴ Burnside and Pulaski provide no reason to question Charter’s competing provider penetration figures or why an extension of time is merited in this proceeding. As such, we deny their request. The Commission believes that Charter’s methodology is sound since it seeks to accurately quantify subscribers using the best available DBS subscriber data.

8. Charter asserts that it is the largest MVPD in six of the Communities because Charter’s subscribership exceeds the aggregate DBS subscribership for those franchise areas.²⁵ Based upon the aggregate DBS subscriber penetration levels as reflected in Attachment A, calculated using 2000 Census household data,²⁶ we find that Charter has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in these six Communities. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable systems serving these six Communities are subject to effective competition.

B. The Low Penetration Test

9. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if fewer than 30 percent of the households in its franchise area subscribe to its system’s cable service.²⁷ Charter serves 2,577 out of the 10,126 households in unincorporated Knox County reported by the 2000 Census, resulting in a 25.4 percent subscriber penetration rate.²⁸ On this basis, we find that Charter has established that its cable system serving unincorporated Knox County is subject to effective competition.

²³ *Id.*

²⁴ See 47 C.F.R. § 1.46(a).

²⁵ Petition at 5 and Exhibit 4.

²⁶ See *id.* at Exhibit 6.

²⁷ See 47 U.S.C § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(l).

²⁸ Petition at 7 and Exhibits 4, 6 (2,577 Charter subscribers ÷ 10,126 unincorporated Knox County 2000 Census Households = 0.254).

III. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed by Falcon Community Cable, L.P. d/b/a Charter Communications **IS GRANTED**.

11. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service in the Cities of Burnside, Columbia, Corbin, and Monticello; and McCreary and Pulaski Counties, Kentucky **ARE REVOKED**.

12. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.²⁹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

²⁹ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR-5964-E

**COMMUNITIES SERVED BY
FALCON COMMUNITY CABLE , L.P.
D/B/A CHARTER COMMUNICATIONS
SUBJECT TO THE COMPETING PROVIDER TEST**

Communities	CUIDS	CPR*	2000 Census Households⁺	Estimated DBS[‡] Subscribers⁺	Charter Subscribers⁺
Burnside	KY0017	18.4	287	53	228
Columbia	KY0119	30.8	1,554	478	1,355
Corbin	KY0007 KY0632 KY0638	18.3	3,308	606	2,774
Monticello	KY0062	33.4	2,508	837	1,800
McCreary	KY0920	23.1	6,520	1,509	2,394
Pulaski	KY0091 KY1132	19.6	16,868	3,314	8,678

*CPR = Percent of competitive DBS penetration rate.

⁺See Petition at Exhibits 4-6.

[‡]DBS subscriber estimate includes 15% reduction.